

STATE v. DENO, 20361-1-III (Wash.App. 8-22-2002)

STATE OF WASHINGTON, Respondent v. DANIEL PAUL DENO,
Appellant.

No. 20361-1-III. The Court of Appeals of Washington, Division
Three. Panel Nine.

Filed: August 22, 2002. DO NOT CITE. SEE RAP 10.4(h).
UNPUBLISHED OPINION.

[EDITOR'S NOTE: This case is unpublished as indicated by the
issuing court.]

Appeal from Superior Court of Spokane County, No. 011003144,
Hon. Salvatore F. Cozza, June 22, 2001, Judgment or order
under review.

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DENNIS J. SWEENEY, J.

This is a drug delivery case. The question presented is
whether the trial judge abused his discretion by refusing to
grant immunity to a witness – Daniel Deno's cohort. The trial
court's decision rests on tenable grounds or tenable reasons.
We therefore find no abuse of discretion and affirm the
conviction.

FACTS

Police used Glenda Davis to buy drugs at Darryl Flambouras's
residence. Ms. Davis asked to buy \$100 worth of cocaine. Mr.
Flambouras said he did not have that much, but that `Dan'
could get it. Ms. Davis gave \$100 to a man later identified as
Daniel Deno. Mr. Deno then left.

Police saw Mr. Deno get into a van and leave Mr. Flambouras's residence. The van was registered to Mr. Deno. Police followed Mr. Deno to another address and then back to Mr. Flambouras's residence.

Mr. Deno returned and handed Mr. Flambouras a baggie of drugs. Mr. Flambouras then gave the drugs to Ms. Davis and she left.

The State charged Mr. Deno with delivery of a controlled substance. Before trial, Mr. Deno moved for a continuance. He argued that Mr. Flambouras was a necessary witness who was unavailable because he would exercise his Fifth Amendment privilege against self-incrimination. Mr. Deno did not know what Mr. Flambouras's testimony would be. The court concluded there was an insufficient showing that Mr. Flambouras would provide any significant or exculpatory testimony and denied his motion.

The matter proceeded to trial. Mr. Deno called Mr. Flambouras to testify at the close of the State's case. Mr. Flambouras exercised his Fifth Amendment right and refused to testify. The court held that Mr. Flambouras was entitled to take the Fifth and excused him from the proceeding.

Mr. Deno testified that he had never sold drugs or participated in the sale of drugs. The jury convicted him as charged.

DISCUSSION Continuance

Mr. Deno first claims that the court should have granted his motion for a continuance. But he fails to argue the issue in his brief. And issues not supported by argument and authorities are abandoned. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). Moreover, the court did not err by denying Mr. Deno's motion.

We review a trial court's decision as to whether to grant a continuance for an abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). The court's exercise of

discretion requires tenable grounds or tenable reasons. *State v. Angulo*, 69 Wn. App. 337, 341-42, 848 P.2d 1276 (1993).

There is no mechanical test for determining 'when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result.' *State v. Eller*, 84 Wn.2d 90, 96, 524 P.2d 242

(1974). Instead, the determination must be made on a case-by-case basis. *Id.* The decision to deny a continuance will be reversed only on a showing that the defendant was prejudiced and/or the result of the trial would have likely been different had the continuance been granted. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (citing *Eller*, 84 Wn.2d at 95-96).

Here, Mr. Deno was unable to make any showing as to what Mr. Flambouras would testify to, or how it would be exculpatory. And, more importantly, Mr. Deno cannot show how granting a continuance would have made Mr. Flambouras available to testify. Mr. Flambouras's Fifth Amendment privilege extends through both trial and appeal. *State v. King*, 78 Wn. App. 391, 397-98, 897 P.2d 380 (1995), *aff'd*, 130 Wn.2d 517, 925 P.2d 606 (1996). The court did not then err by denying Mr. Deno's motion for a continuance.

Immunity

Mr. Deno argues that his Sixth Amendment right to compulsory process includes the right to obtain witnesses in his favor. But here, Mr. Flambouras's Fifth Amendment right against self-incrimination conflicted with Mr. Deno's Sixth Amendment right to process. The court should then have remedied the conflict by granting Mr. Flambouras immunity and requiring him to testify.

'The determination of whether the hazards of self-incrimination are genuine and whether the [Fifth Amendment] privilege applies is within the sound discretion of the trial court.' *State v. Fish*, 99 Wn. App. 86, 93, 992 P.2d 505

(1999).

Mr. Deno couches his argument as a violation of his Sixth Amendment right to compulsory process. 'An error is of constitutional magnitude if it impacts a defendant's Sixth Amendment right to compel witnesses.' State v. Delgado, 105 Wn. App. 839, 844, 18 P.3d 1141 (2001).

Mr. Flambouras was entitled to invoke the Fifth Amendment right against self-incrimination. A witness's testimony "need only furnish a link in the chain of evidence needed to prosecute the witness for a crime" for the Fifth Amendment to apply. Fish, 99 Wn. App. at 92-93 (quoting State v. Hobbles, 126 Wn.2d 283, 290, 892 P.2d 85 (1995)). Here, the State presented testimony that Mr. Flambouras was integral to the sale of the cocaine. And the State charged Mr. Flambouras with criminal conduct arising from the incident.

A defendant has no power to compel the court to grant a witness immunity. Fish, 99 Wn. App. at 93 ('The decision to grant immunity is vested with the prosecution, and a defendant has no right to demand immunity for a defense witness in order to obtain exculpatory testimony unless a court finds the prosecutor's misconduct intimidated the witness to the point the witness declined to testify.');

State v. Carlisle, 73 Wn. App. 678, 681, 871 P.2d 174 (1994) ('A defendant has no right to demand immunity for defense witnesses to obtain exculpatory testimony.');

State v. Matson, 22 Wn. App. 114, 120-21, 587 P.2d 540

(1978) ('A defendant does not have a right to a grant of immunity to a witness, or to compel such a grant.'). The only exception is when the witness's decision not to testify stems from prosecutorial misconduct – like intimidation. Fish, 99 Wn. App. at 93; Carlisle, 73 Wn. App. at 681.

Mr. Deno relies on language found in State v. Mannhalt.[1] There, the court first stated the general rule that defendants do not have the right to compel the granting of immunity.

State v. Mannhalt, 33 Wn. App. 696, 703, 658 P.2d 15 (1983).
The court then stated:

Cases in other jurisdictions, however, have recognized that under some circumstances the refusal to grant a defendant's request to immunize witnesses may result in denying the defendant due process and a fair trial.

These cases require a showing of either extreme prosecutorial misconduct or vital necessity in obtaining exculpatory, noncumulative testimony.

Id.

But Mannhalt does not help Mr. Deno. First, the Mannhalt court was commenting on the law in other states, it was not in any way changing Washington law. Second, even if the exceptions found in other states were adopted in Washington, they are not applicable to the present case. Mr. Deno makes no allegation, let alone a showing, of any prosecutorial misconduct. And he failed to make even an offer of proof as to what Mr. Flambouras might testify to.

Mr. Deno's right to compel witnesses was not violated. Mr. Flambouras did in fact appear. The trial court did not abuse its discretion by allowing Mr. Flambouras to exercise his Fifth Amendment privilege. And Mr. Deno has no right to compel the court or State to grant Mr. Flambouras immunity. There was no error.

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: KATO, A.C.J., KURTZ, J.

[1] 33 Wn. App. 696, 658 P.2d 15 (1983).